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Supreme Court of the United States

OCTOBER TERM, 1990

ASHKENAZY PROPERTY MANAGEMENT CORPORATION d/b/a L'ERMITAGE HOTEL; ASHKENAZY ENTERPRISES, INC.; ASHKENAZY DEVELOPMENT CORPORATION; 9289 BURTON COMPANY d/b/a L'ERMITAGE HOTEL,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES and BARTENDERS UNION, LOCAL 11, AFL-CIO,

Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTERVENOR'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the D.C. Circuit, in its unpublished decision in *Ashkenazy III*, correctly applied the law-of-the-case doctrine in holding that the Ninth Circuit's *Ashkenazy II* order was neither "clearly erroneous" nor "manifestly unjust" insofar as it required the NLRB to provide back-pay to the victims of petitioners' unfair labor practice violations without regard to their immigration status.

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Intervenor Hotel Employees and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO respectfully asks this Court to deny the Petition for Writ of Certiorari seeking review of the District of Columbia Circuit's opinion in this case.

OPINIONS BELOW

The unpublished *per curiam* opinion of the United States Court of Appeals for the District of Columbia (*Ashkenazy III*) is reprinted at Pet. App. A6-14. The

supplemental decision and order of the National Labor Relations Board is reported at 293 NLRB No. 114 (1990) and reprinted at Pet. App. A15-29. The first decision of the Ninth Circuit in this case is reported at 796 F.2d 479 (1986) (*Ashkenazy I*). The second decision of the Ninth Circuit in this case, which was adopted as the law of the case by the D.C. Circuit, is reported at 817 F.2d 74 (1987) (*Ashkenazy II*) and reprinted at Pet. App. A60-61.

ADDITIONAL STATUTE INVOLVED

Section 101(a)(3)(A) of the Immigration Reform and Control Act of 1986 ("IRCA") provides:

> Section 274A(a)(1) of the Immigration and Nationality Act [8 U.S.C. § 1324a(a)(1)] shall not apply to the hiring, or recruiting or referring of an individual for employment which has occurred before the date of the enactment of this Act.

STATEMENT OF THE CASE

More than a decade ago, petitioners Ashkenazy Property Management Corp. *et al.* ("Ashkenazy") discharged the entire housekeeping staff of the L'Ermitage Hotel in Beverly Hills because the staff had engaged in concerted activities to better their working conditions. After intervenor union filed an unfair labor practice charge, the ALJ issued a decision finding that Ashkenazy had violated § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), and recommending the conventional backpay remedy. 268 NLRB 744, 751.[1] The NLRB affirmed the ALJ's decision and recommended order. 268 NLRB at 744 (1984). On a Petition for Enforcement, the Ninth Circuit affirmed the Board's order in its entirety, including the requirement that Ashkenazy provide backpay to its former workers. 796 F.2d 479 (9th Cir. 1986) (*Ashkenazy I*).

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[1] Reinstatement was also ordered, but that is no longer an issue in the case. *See* Pet. App. A19-21.

The case was returned to the NLRB for compliance proceedings. On December 19, 1986, shortly after the enactment of the Immigration Reform and Control Act of 1986 ("IRCA"), the NLRB's Compliance Officer sent a letter to each discriminatee, requiring them to prove their entitlement to "legalization" under IRCA as a precondition to receiving backpay. Because this letter indicated that the NLRB's General Counsel might "reconsider" the Board's earlier backpay order, intervenor union filed a Motion to Compel Compliance in the Ninth Circuit. The union argued that it was impermissible to require the victims of Ashkenazy's unfair labor practices to prove their "lawful" immigration status as a precondition to obtaining backpay because: 1) no such requirement was contained in *Ashkenazy I* or the Board's remedial order which the Ninth Circuit had enforced; 2) any such requirement would be inconsistent with the Ninth Circuit's decision in *Local 512, ILGWU v. NLRB*, 795 F.2d 705 (9th Cir. 1986) ("*Felbro*"), which held that the NLRB and its compliance officers had neither the statutory authority nor the administrative competence to consider a worker's immigration status as a precondition to eligibility for backpay relief under the NLRA; and 3) nothing in the newly-enacted IRCA or its legislative history had changed this result.

The NLRB responded to the union's motion by acknowledging that *Ashkenazy I* required its compliance proceedings to be conducted in a manner consistent with *Felbro*. The NLRB went on to state, however, that it would acquiesce in the Ninth Circuit's *Felbro* decision only with respect to the instant case.

In light of the Board's agreement to follow *Ashkenazy I* and *Felbro* in this case, the Ninth Circuit denied Intervenor's Motion to Compel Compliance as moot. Pet. App. A60 ("*Ashkenazy II*"). The court stated, however, that the Board's "agree[ment] to comply with *Felbro* in this case only is unacceptable," and it reiterated the govern-

ing principle that "in the case of workers *present* in the United States, remedies afforded for violations of the [NLRA] . . .[are] to be implemented *regardless of the worker's immigration status.*" Pet. App. A60-61 (emphasis added).

On remand, Ashkenazy continued to oppose the issuance of a backpay award, on the ground that some of the discriminatees may have been undocumented aliens. In September 1988, an ALJ again rejected this argument, holding that since the Ninth Circuit "had required that its *Felbro* holding be applied to the discriminatees herein," Ashkenazy was "precluded from attempting to demonstrate the immigration status of the discriminatees." Pet. App. A34. The ALJ's Recommended Order included a backpay award of approximately $75,000. Pet. App. A57, A59.

Ashkenazy appealed this backpay award to the NLRB, which again affirmed the ALJ's ruling (with certain modifications in the amounts of pay owing). Pet. App. A22. Rather than challenging this decision for a second time in the Ninth Circuit, whose views on the issue were well-settled, Ashkenazy instead filed a Petition for Review in the D.C. Circuit, making the identical arguments that it had unsuccessfully urged in its previous appeal.

The D.C. Circuit affirmed the NLRB's backpay award under a law-of-the-case analysis, finding application of that doctrine to be "particularly appropriate where a party brings a previously decided issue before a second forum, in an attempt to 'forum shop' for a second opinion." Pet. App. A10. The court concluded:

> Here, the Ninth Circuit previously decided that the Board was required to conduct its back pay hearings in a manner consistent with the Ninth Circuit's *Felbro* decision. Indeed, the Ninth Circuit specifically stated that "in the case of workers present in the United States, remedies afforded for violations of the National Labor Relations Act, 29

> U.S.C. Section 158 (1982), [are] to be implemented regardless of the worker's immigration status." . . .
>
> Under the law of the case, this court should respect this prior ruling unless it is clearly erroneous or will work a substantial injustice. . . . Here, Ashkenazy argues that the Ninth Circuit's decision to apply *Felbro* in this case is clearly erroneous when examined under the Supreme Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). . . .
>
> Although this Court need not adopt a similar interpretation of *Sure-Tan*, we find that the rationale provided by the Ninth Circuit is not clearly erroneous, nor does it work a substantial injustice. For these reasons, the law of the case applies, and the Board was correct in holding its hearing to comply with the law of the Ninth Circuit.

Pet. App. A11-12.[2]

REASONS FOR DENYING THE WRIT

Ashkenazy urges this Court to grant certiorari to determine whether the Ninth Circuit's decision five years ago in *Local 512, HGWU v. NLRB*, 795 F.2d 705 (1986) ("*Felbro*"), is inconsistent with this Court's decision in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). There are numerous reasons why the Court should not grant certiorari.

1. The present case arises in the context of a law-of-the-case analysis. The appropriate inquiry is therefore not whether the underlying Ninth Circuit decision in *Felbro* was legally correct, but whether that decision (and the Ninth Circuit's reliance on *Felbro* in *Ashkenazy II*) were "clearly erroneous" or "manifestly unjust." See Pet. App. A11. This case therefore does not present an

[2] The D.C. Circuit also held that the Board's backpay awards were supported by substantial evidence (Pet. App. A12-13) and that the Board did not err by ordering the backpay for nine unavailable discriminatees to be placed in escrow (Pet. App. A13-14). Ashkenazy does not challenge those holdings.

appropriate vehicle for considering the legal issue that is at the root of Ashkenazy's Petition.

2. In any event, the Ninth Circuit's analysis in *Felbro* was correct. In deciding *Felbro*, the Ninth Circuit analyzed this Court's *Sure-Tan* decision in depth, and properly concluded that nothing in *Sure-Tan* precluded the award of backpay to "an undocumented worker who remains in the United States, and who has not been the subject of any INS deportation proceedings." 795 F.2d at 717.

At issue in *Sure-Tan* was the propriety of a six-month "speculative" backpay award to unfair labor practice discriminatees who had been apprehended by the INS and *who had left the country immediately after their employer had committed its unfair labor practice.* The Court rejected the lower court's award of backpay as an improper attempt to "estimate" on a barren factual record what an appropriate backpay award might be "without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS. . . ." 467 U.S. at 901. The Court noted, however, that if the record had contained "evidence . . . as to the period of time these particular employees might have continued working before apprehension by the INS," a backpay award for that period of time would have been appropriate (*id.* at 901 n.11)—thus indicating that if the discriminatees had stayed in this country rather than returning immediately to Mexico upon apprehension by the INS, they would have been entitled to backpay.[3]

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[3] While Ashkenazy points to the Court's statement that "in computing backpay, the employees must be deemed 'unavailable' for work . . . during any period when they were not lawfully entitled to be present and employed in the United States" (467 U.S. at 903), the Court's reference to "the" employees was presumably to the *Sure-Tan* discriminatees who were absent from the United States as a result of having accepted voluntary deportation on the same day their employer committed its unfair labor practice.

3. The Ninth Circuit's reading of *Sure-Tan* has been embraced by every court of appeal to consider it. For example, the Second Circuit in the Title VII case of *Rios v. Enterprise Assoc. of Steamfitters Local 638*, 860 F.2d 1168 (2d Cir. 1988), held:

> We conclude, in agreement with the Ninth Circuit, that undocumented workers who remained in this country are eligible for backpay as of the time of a violation. *NLRB v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987) (NLRA case) [*Ashkenazy II*]; *Local 512, Warehouse & Office Workers' Union v. NLRB* [*Felbro*], 795 F.2d 705 (9th Cir. 1986) (NLRA case). We find such awards to be consistent with *Sure-Tan*'s holding that the protections of the NLRA—and by analogy, Title VII—must apply to undocumented workers, at least to the extent that those protections do not conflict with immigration laws.

860 F.2d at 1173. Similarly, the Eleventh Circuit in the Fair Labor Standards Act case of *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989), agreed that *Sure-Tan* does *not* preclude undocumented aliens from recovering backpay or liquidated damages under the Fair Labor Standards Act, as long as they were present in the country during their backpay periods. To our knowledge, no other court has concluded differently.[4]

4. Ashkenazy further contends that even if *Felbro* were correctly decided at the time, it should no longer be controlling because of the intervening impact of IRCA, which subjects employers to statutory sanctions if they hire undocumented aliens after the November 6, 1986 effective date of the Act. According to Ashkenazy,

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[4] Moreover, the Ninth Circuit expressly reaffirmed its *Felbro* analysis in *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989); *see also EEOC v. Tortilleria "La Mejor,"* —— F.Supp. ——, No. CV-F-87-505 REC (E.D.Cal., Feb. 20, 1991) (undocumented alien entitled to seek backpay award under Title VII).

IRCA removes the "linchpin of the Ninth Circuit's analysis by making an award of back pay . . . a violation of the immigration laws." See Pet. at 18-19. There are at least four flaws in this argument.

First, as the NLRB pointed out in its argument to the D.C. Circuit, IRCA's employer sanctions provisions are irrelevant in this case, because Ashkenazy hired all of the L'Ermitage Hotel discriminatees in this case well *before* IRCA went into effect. For that reason, those discriminatees all qualify as "grandfathered employees" under § 101(a)(3)(A) of IRCA, which creates an exemption from the employer sanctions provision for workers "hir[ed] . . . before the date of the enactment of this Act." [5]

Second, even if the discriminatees in this case were *not* grandfathered, there would still be no conflict between Ashkenazy's backpay obligations under the NLRA and its immigration obligations under IRCA. Satisfaction of a backpay award by an employer does *not* trigger sanctions under IRCA. Rather, employer sanctions under IRCA are imposed only for the knowing employment of non-grandfathered undocumented workers after November 6, 1986. While IRCA gives employers a legitimate, non-discriminatory statutory justification for refusing to hire undocumented workers after that date, it does *not* permit employers to treat such workers in a discriminatory manner proscribed by other statutes. An employer who unlawfully hires and unlawfully discriminates against an undocumented worker may be twice penalized —under the NLRA for engaging in proscribed discrimination, and under IRCA for knowingly employing an

[5] *See* Pet. App. A23. Moreover, since the underlying unfair labor practice occurred in January 1981, the likelihood is that the discriminatees were also eligible for legalization under § 245A of IRCA, 8 U.S.C. § 1254a, which provides legalization to aliens who were continuously present in this country in undocumented status as of January 1, 1982.

undocumented worker. It would be counter to the congressional policies underlying those statutes to permit employers to "set off" one statutory remedy against another. *Cf. W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770 (1983).

Third, nothing in the language of IRCA reveals any intent to alter the NLRB's longstanding policy of providing a traditional backpay remedy to discrimatees regardless of their immigration status. Because Congress is presumed to know the effect of its legislative actions and to speak clearly when it wishes to amend a previously-enacted statute, "it is . . . a cardinal rule of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). Although Congress in IRCA amended a number of other federal statutes, generally for the purpose of limiting the rights of undocumented aliens under their provisions, Congress did not amend the remedial provisions of the NLRA, or any other federal labor law, that had been construed to provide backpay to injured workers regardless of their immigration status.[6]

Finally, IRCA's legislative history expressly stated Congress's intent that federal labor and employment law protections should continue to be available in order to strengthen the deterrent effects of the new employer sanctions provisions. The House Judiciary Committee Report accompanying IRCA thus stated:

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[6] *See* IRCA § 101(b)(1) (amending the Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470); IRCA § 121(a)(1) (amending § 1137 of the Social Security Act, 42 U.S.C. § 1320b-7); IRCA § 121(a)(2) (amending § 214 of the Housing and Community Development Act of 1980, 42 U.S.C. § 1436a); IRCA § 121(a)(3) (amending § 484 of the Higher Education Act of 1965, 20 U.S.C. § 1091); IRCA § 121(a)(5) (amending § 16 of the Food Stamp Act of 1977, 7 U.S.C. § 2025); IRCA § 121(a)(6) (amending the United States Housing Act, 42 U.S.C. § 1437 *et seq.*).

> *It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal . . . labor relations boards . . . to remedy unfair practices* committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not intended to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in Sections 7 and 8 of that Act. As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), application of the NLRA "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment." 467 U.S. at 893.

H. Rep. No. 99-682 (I), 99th Cong. 2d Sess. 58 (emphasis added). The House Education and Labor Committee Report on IRCA similarly stated:

> In addition, *the committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as . . . the National Labor Relations Board, . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by those agencies.* To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

H. Rep. No. 99-682 (II), 99th Cong., 2d Sess. 8-9 (emphasis added). Thus, contrary to Ashkenazy's assertion, nothing in IRCA or its legislative history suggests that Congress intended to limit the backpay rights of undocumented aliens under the NLRA.

CONCLUSION

For the reasons stated, Intervenor hereby requests that the Petition for Writ of Certiorari be DENIED.

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